



SENATE BILL 960: Ensure Accountability Re: Stimulus Funds

2009-2010 General Assembly

Committee:	Senate Select Committee on Economic Recovery	Date:	July 8, 2009
Introduced by:	Sen. Nesbitt	Prepared by:	Karen Cochrane-Brown
Analysis of:	PCS to First Edition S960-CSRO-72		Committee Counsel

SUMMARY: *The Proposed Committee Substitute for Senate Bill 960 makes amendments to the State competitive bidding process, exempts State agencies from rulemaking and contested cases under the APA, restricts a civil litigant's ability to recover attorney's fees and to obtain injunctive relief, and exempts all State agencies from the Umstead Act, all in order to facilitate expedited use and expenditure of federal funds under the American Recovery and Reinvestment Act of 2009 (ARRA). The bill also amends the informal bid process for transportation infrastructure maintenance, renames the "Energy Improvement Loan Program" and expands it to allow loans for individual residents in North Carolina.*

The act becomes effective February 17, 2009, and several provisions expire June 30, 2012.

BILL ANALYSIS:

Section 1 amends the law governing the competitive bidding process for State agencies. The new subsection would require that all contracts for goods, equipment, or services awarded by the Department of Administration, universities, community colleges, or other State agencies be awarded, "to the maximum extent practicable, using fixed-priced contracts and competitive procedures. The Secretary of Administration and the Office of Economic Recovery (OERI) are directed to adopt rules, regulations, and policies to promote the efficient and expeditious award of ARRA contracts.

Section 2 amends the law relating to the Secretary of Administration's authority to adopt rules governing the award of contracts. The new provision directs the Secretary, working with OERI, to adopt rules relating to specific aspects of the bidding and contracting process. The section exempts any rules adopted pursuant to it from the rulemaking procedures of the Administrative Procedure Act (APA), but requires that the rules be published in the North Carolina Administrative Code. The rules must allow for at least a 10-day public comment period after the rules are published and have become effective.

Section 3 amends the APA to exempt all State agencies from the rulemaking requirements in connection with implementing ARRA. Under current law, in order to adopt a permanent rule, an agency must publish a notice of the text of a proposed rule, accept public comment for at least 60 days, hold a public hearing if requested, prepare a fiscal note, and have the rule approved by the Rules Review Commission before it can be published in the Code and become effective.

Section 4 amends the APA to exempt all State agencies from the contested case requirements with respect to contract disputes, protests, and claims arising from the implementation of the ARRA. Currently, parties aggrieved by an agency's action may obtain a hearing before an independent administrative law judge (ALJ), who issues a decision which is then returned to the agency. The agency can only reverse the decision of the ALJ under limited conditions.

Sections 5, 6, and 7 make further changes to the purchasing and contracts laws. Currently, under G.S. 143-53.1, there are bid value benchmarks for agencies, universities, and community colleges for

Senate Bill 960

Page 2

purchases of commodities. The agency handles any purchase of commodities or services under the benchmark, subject to rules and procedures adopted by the Secretary of Administration. Any purchase over the benchmark is subject to the competitive bidding procedures set out in G.S. 143-52. The bill would provide that these benchmarks shall be applicable to all contracts for commodities awarded using funds from the ARRA.

Bidders on these contracts would also be required to certify that bids are submitted competitively and without collusion, as is required for bidders on other State contracts under G.S. 143-53.1.

G.S. 143-55 requires agencies to purchase commodities only from sources established by contract and certified by the Secretary of Administration. The bill would exempt purchases made using funds from the ARRA from these contracts. However, the Secretary of Administration, in coordination with OERI, would be able to approve the use of term contracts in limited circumstances.

Section 8 amends the law to prohibit a party in a civil action against a State agency from recovering attorney's fees if the claim relates to (i) implementation of ARRA, (ii) the award of contracts or grants (iii) a vendor's default under an ARRA contract, and/or (iv) a vendor's debarment resulting from a default under ARRA.

Sections 9, 10, and 11 amend the Civil Procedure Act to prohibit any court in the State from granting a preliminary injunction or other injunctive relief to a party in a civil action if the order would delay, prevent, or stop the award or performance of any ARRA contract or grant, unless the party seeking such relief raises a claim based on constitutional violation or criminal or ethical misconduct. If the party raises such a claim, the party must also provide a surety bond or other collateral that would fully compensate the State for all ARRA funds it may lose if the relief is granted.

Section 12 creates an exemption from the Umstead Act for OERI and any State agency in connection with implementation of ARRA funded projects.

Section 13 provides that recovery funds not specified in the ARRA may be expended on the approval of OERI. OERI must report any expenditure of funds to the Joint Legislative Commission on Governmental Operations at its next meeting.

Section 14 allows the State to include protective remedies in any contract or grant awarded under ARRA, to be available in the event funds are not used properly. Such remedies include withholding State revenues from local governments and monetary penalties against nonprofits or for profit entities.

Section 15 allows contracts for highway maintenance that are \$1,200,000 *per year* or less to be let using the informal bid process. It also changes terminology from "highway" to "transportation infrastructure" to be more inclusive.

The section is set out twice to account for Senate Bill 828, which amended the same statutory section in a similar way with slightly different language. Senate Bill 828 has passed and has been presented to the Governor. Section 15.(a) of this bill will be effective if Senate Bill 828 does not become law, and Section 15.(b) will be effective if it does.

Section 16 The Business Energy Improvement Program was established by the General Assembly in 2000 to provide information, assistance, and secured loans to businesses in the State for energy efficient capital improvements. In 2001, the program was renamed the "Energy Improvement Loan Program" and expanded to include local governmental units and nonprofits in the State.

This section of the bill renames the program the "Energy Loan Fund," and expands it to allow loans for individual residents in North Carolina. The maximum amount of a loan is \$1,000,000 for energy efficient and renewable energy improvements for businesses, local governments, nonprofits, and multifamily and mixed-use buildings. The maximum amount of a loan for energy efficient and

Senate Bill 960

Page 3

renewable energy improvements for single family residences is \$50,000. The interest rates for loans will vary from 0% to 3%, as determined by the Energy Office. The Energy Office may contract with other entities to administer the Fund. The administrative expenses subject to ARRA funds may not exceed 10% of the funds allocated for this purpose.

EFFECTIVE DATE: This act becomes effective February 17, 2009. Sections 1 through 12 of the act expire June 30, 2012.

Wendy Graf Ray and Heather Fennell, Research Division attorneys, contributed to this summary.

S960-SMRO-146(CSRO-72) v1